

1182309 - R8 SDMS



Complaint
Joan Card
to:
Mia Bearley
11/10/2010 09:22 AM
Cc:
tdaley
Show Details

History: This message has been replied to.

2 Attachments



image001.gif Complaint.10.21.10 Case 100500854.pdf

Mia, fyi. Park City motions will be filed early next week.

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Attorney for Plaintiff,
Nadine Gillmor

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SUMMIT COUNTY, STATE OF UTAH

NADINE GILLMOR, an Individual,

Plaintiff,

vs.

PARK CITY MUNICIPAL
CORPORATION, a Utah municipal
corporation, and PARK CITY WATER
DISTRICT, a Utah Special Service
District,

Defendants.

COMPLAINT

Civil No. 100500854

Judge: K. Kelley

Plaintiff Nadine Gillmor ("Plaintiff") complains against Defendants Park City Municipal Corporation and Park City Water District as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Nadine Gillmor is an individual residing in Summit County, Utah and is the owner of certain real property and water rights located within the Snyderville Basin of Summit County, Utah.

2. Defendant Park City Municipal Corporation is a municipal corporation organized and existing under the laws of the State of Utah.

3. Defendant Park City Water Service District is a political subdivision of the State of Utah.

4. Park City Municipal Corporation and Park City Water District are collectively referred to herein as "Park City."

5. The Pace-Homer Ditch, which is a subject matter of this lawsuit, is located in the Snyderville Basin, Summit County, Utah.

6. Pursuant to Utah Code Ann. § 63G-7-401, Plaintiff filed a Notice of Claim with the City Recorder of Park City on July 26, 2010.

7. Since Park City failed to approve or deny (or respond in any way to) the Notice within sixty days, it is deemed denied. *See* Utah Code Ann. § 63G-7-403(1)(b).

8. Accordingly, Plaintiff has the right to bring this action in district court. *Id.* at § 63G-7-403(2); *see also id.* at § 78A-5-102(1).

9. Venue is appropriate in this Court because the property and water rights in question are located in Summit County. Moreover, Plaintiff and Defendants are all located in Summit County.

GENERAL ALLEGATIONS

10. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 9 above.

11. Plaintiff is the owner of lands located in Section 35, Township 1 South, Range 4 East, SLB&M (the "Property").

12. The Property is located within the Silver Creek drainage area of the Snyderville Basin and is situated easterly of U.S. Highway 40 and northerly of Utah State Road 248.

13. The Property is bisected by Silver Creek, which runs through its length. The Property also contains a number of seeps and springs.

14. From at least 1860, the Property has been used for the cultivation of crops and maintenance of livestock. In fact, the Property is among the earliest settled properties in the Park City area.

15. To improve the lands and make them productive and usable, the prior owners of the Property appropriated water and perfected the legal right to that water from Dorrity Spring, Silver Creek, and the numerous seeps and springs located on the land.

16. Those perfected water rights have a priority date of 1860 and are confirmed as Awards 820 and 968 of the Weber River Decree.

17. Plaintiff Nadine Gillmor is the owner of those portions of Awards 820 and 968 associated with the Property and has continually diverted and placed such water to beneficial use.

18. To facilitate the diversion and use of water for beneficial uses on the land, Plaintiff's predecessors in interest constructed diversion structures and ditches to convey the water from the sources of supply to the irrigated lands. Those ditches include the Pace-Homer

Ditch, which extends from Dorrity Spring in the Park Meadows area of the Snyderville Basin to the Property.

19. The Pace-Homer ditch crosses Sections 2, 3, 9 and 10, Township 1 South, Range 4 East, SLB&M.

20. Along its length, the Pace-Homer ditch picks up water from other tributaries, including sources in Deer Valley and the Park Meadows area. Accordingly, there are a number of diversion points on Silver Creek through which that water supply is obtained along with conveyance structures that measure and regulate the flow of water.

21. Flows conveyed through the Pace-Homer ditch also directly contribute to, and form a part of, the seepage flows on the Property that make up a significant portion of Plaintiff's water rights.

22. Accordingly, Plaintiff's water rights include an interest in each of the sources of supply defined under the historical Awards, including water from Silver Creek, the Pace-Homer Spring, and seepage rights as well as confirmed rights to the use and maintenance of the Pace-Homer ditch.

23. Plaintiff is entitled to water for irrigation purposes from the period beginning April 1 through October 31 of each year. The stock watering rights under those Awards extend from January 1 to December 31 of each year.

24. Specifically, Plaintiff owns water right numbers 35-5825 and 35-5842, which represent waters under Award 820.

25. Nadine Gillmor's ownership interest in Award 968 includes the right to the continued flow of water in the Pace-Homer ditch to maintain the seepage flows confirmed under the Weber River Decree. Those rights are in addition to her direct right to diversions into and from the Pace-Homer ditch under Award 820.

26. Over the years, portions of the Pace-Homer ditch and the flume from which water is diverted, have been relocated to accommodate realignment and enlargement of State Road 248.

27. In each of those instances, the realignment was made with the consent of the owners of water rights in the ditch and in a manner that would not unreasonably interfere with water flows or affect the seepage rights fed by the ditch.

28. On March 10, 2010, Park City sent a letter to Nadine Gillmor informing her of its intent to unilaterally alter the Pace-Homer ditch by piping a portion of the ditch through Section 2, Township 1 South, Range 4 East, SLB&M immediately upstream of the Property and to remove the historical flume and diversion structure at the head of that section of the ditch.

29. Without input from the Plaintiff, Park City undertook plans to remove a portion of the Pace-Homer ditch and replace that ditch with pipe to be used as part of its planned water treatment plant.

30. The letter did not seek Mrs. Gillmor's permission or consent to the ditch alterations, but instead informed her that the alteration work would commence in late March and be completed by late April 2010.

31. Mrs. Gillmor received the letter, which was not certified or registered, on March 17, 2010. By the time she received the letter, Park City had already commenced work on the ditch and had removed the historical flume.

32. Through numerous written correspondence beginning on March 22, 2010, Mrs. Gillmor notified Park City of its interference with her rights in the ditch, requested a meeting to discuss the ditch alterations, and demanded that the construction activities cease until the rights of the parties were identified and the impacts of the alterations addressed and remedied. Copies of the correspondence are attached hereto as Exhibit "A" and by this reference incorporated herein.

33. Park City refused those requests and demands.

34. In addition to altering and removing property in which Mrs. Gillmor has direct ownership rights, Park City's alteration of the ditch directly interfered with her rights to receive water on her property under her decreed water rights and permanently impacted the seepage flows on her property that constitute the basis for her rights under Water Right 35-8968 (Award 968).

35. Park City's disregard for Plaintiff's rights was wanton and deliberate. Despite receiving written notification of Plaintiff's rights in the ditch and the impact to her water and other property rights, Park City continued to remove the ditch and appurtenant structures.

36. This pattern of disregard for Plaintiff's rights is consistent with Park City's prior actions against the interests of Mrs. Gillmor, including its interference with her water rights in Dorrity Spring, alteration of flows contributing to her water rights from Silver Creek and its

tributaries, contamination of her property through the release of waters from mine tunnels that contain identified quantities of heavy metals and other contaminants, and refusal to approve development of the Property and other properties owned by Plaintiff.

FIRST CAUSE OF ACTION
Trespass

37. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 36 above.

38. Plaintiff has ownership rights in all of the diversion and conveyance facilities associated with Awards 820 and 968 of the Weber River Decree.

39. Those ownership interests include rights in the Pace-Homer ditch and its appurtenant conveyance and diversion facilities as well as easement rights associated with the ditch and appurtenant facilities.

40. Park City committed trespass against those rights by unilaterally removing and destroying, without consent, the Gillmor Flume located on the Pace-Homer ditch and identified in the construction drawings attached to Park City's March 10, 2010 letter to Plaintiff.

41. Park City also committed trespass by destroying the portions of the historical ditch located in Section 2, Township 1 South, Range 4 East, SLB&M that form a part of Plaintiff's conveyance structures under Awards 820 and 968 of the Weber River Decree and that have been in existence since at least 1860.

42. Park City further trespassed by placing its pipeline within the historical ditch easement without the consent of Mrs. Gillmor or the payment of compensation for the appropriation of the easement and removal of the ditch.

43. Park City's actions in invading Mrs. Gillmor's property were willful and malicious, with full knowledge of Mrs. Gillmor's rights and objections to Park City's conduct.

44. The unilateral actions of Park City in removing the ditch and appurtenant facilities and appropriation of the historical easement have directly damaged Plaintiff's water rights and the Property. As a result, Plaintiff is entitled to injunctive relief and damages in an amount to be determined at trial.

SECOND CAUSE OF ACTION

Conversion

45. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 44 above.

46. Plaintiff owns rights in the Pace-Homer ditch and related diversion and conveyance structures, including easements upon which those structures are located.

47. Park City intentionally removed, without Plaintiff's consent or approval, a significant portion of the ditch, the Gillmor Flume and other structures in furtherance of its interests in constructing a water treatment plant and/or pipeline.

48. Park City's alteration, removal and destruction of those facilities constitute the appropriation and conversion of those facilities to its own use and without regard for the rights of Mrs. Gillmor.

49. Plaintiff's historical rights in the ditch, diversion and measuring devices and easements have been permanently altered and extinguished.

50. Those intentional actions constitute an unlawful conversion of Plaintiff's property rights by Park City and have resulted in permanent interference with the rights of Plaintiff in her water rights, ditch rights and the Property.

51. In addition, Park City has unlawfully converted the Property by purposefully releasing water from the Judge Tunnel and other Park City owned sources of water to Silver Creek and onto Plaintiff's property. Those water releases have contaminated Plaintiff's property with heavy metals and other constituents rendering the property unsuitable for all uses and constitute an unauthorized use of the property as an unpermitted and unauthorized disposal site.

52. Park City has been aware for many years of the problems with waters that it produces in the Judge Tunnel and has sought and maintained exemptions from the United States Environmental Protection Agency for contamination levels in the water, which waters Park City also uses for culinary water supply to its residents.

53. Park City also allows water released from the Judge Tunnel and other water sources to flow across known and defined mine tailings sites under the jurisdiction and control of the city contributing to the deposition of additional contaminants on Plaintiff's property.

54. As a result of Park City's intentional releases of such water and conveyance of that water across contaminated soils, Park City has damaged Plaintiff by rendering her property unusable for all intended purposes.

55. Park City's conduct was willful and demonstrated a reckless disregard for Mrs. Gillmor's rights in her Property, ditch, and water rights.

THIRD CAUSE OF ACTION
Interference with Water Rights (Quantity)

56. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 55 above.

57. Plaintiff owns water rights appurtenant to the Property under Awards 820 and 968 of the Weber River Decree.

58. Under those rights, Plaintiff is entitled to receive the full quantity of water established under the appropriation and set forth in the Weber River Decree.

59. Water under Plaintiff's rights is supplied to the Property through the Pace-Homer ditch, Silver Creek and springs and seeps.

60. Park City temporarily interfered with those water rights by destroying sections of the Pace-Homer ditch during construction of its unauthorized pipeline.

61. As a result of the construction activities, Park City prevented Plaintiff from receiving the water to which she is lawfully entitled through the historical means of conveyance and diversion, preventing her from placing the water to beneficial use on the Property.

62. Park City permanently interfered with Plaintiff's water rights by unilaterally altering the flows of water under her rights and caused proximate damage to her property rights.

63. In addition, Park City's removal of the sections of the Pace-Homer ditch has permanently altered the flows of water rights to which Plaintiff is entitled.

64. That interference with her right to receive water under the water rights includes the permanent alteration of seepage rights fed by the now-piped portions of the Pace-Homer ditch.

65. Furthermore, Plaintiff has lost control of her diversions at the Gillmor Flume and the piped section of the ditch as a direct result of Park City's actions.

66. Park City's actions unlawfully interfere with the water rights of Plaintiff and the use and enjoyment of her property and water rights.

67. Accordingly, Park City has directly damaged Plaintiff's property and water rights.

68. Park City's conduct was willful and demonstrated a reckless disregard for Mrs. Gillmor's water rights.

FOURTH CAUSE OF ACTION Interference with Water Rights (Quality)

69. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 68 above.

70. In addition to the right to receive the full quantity of water under her rights, Plaintiff is entitled to receive water of a defined quality suitable for the intended uses under her approved water rights.

71. Park City has impermissibly interfered with Plaintiff's water rights by altering the flows of water upstream of the Property and increasing the levels of contaminants in the water to levels that render the water unfit for the approved beneficial uses.

72. In addition, Park City's alteration of water flows, including releases of water produced in historical mine tunnels, has contaminated the soils on the Property historically irrigated by Plaintiff.

73. As a result of Park City's willful action and reckless indifference to her rights, Plaintiff suffers interference with her water rights and has been damaged to the extent of lost production and damage to the Property. Accordingly, Plaintiff is entitled to injunctive relief and damages in an amount to be determined at trial.

WHEREFORE, Plaintiff Nadine Gillmor prays for judgment as follows:

1. With respect to the First Cause of Action---Trespass, Plaintiff prays for the following relief:
 - a. For a declaratory judgment defining the parties' rights in the Pace-Homer ditch, appurtenant conveyance and diversion facilities, and appurtenant easements;
 - b. For a permanent injunction enjoining Park City from alteration of, or interference with, Plaintiff's rights in the Pace-Homer Ditch and appurtenant facilities and easements;
 - c. For an order of the court compelling Park City to restore the historical ditch, appurtenant facilities and easements to their previous and prior condition;
 - d. For damages in an amount to be determined at trial;
 - e. For punitive damages in an amount to be determined at trial;

- f. For all costs, including attorney's fees incurred in prosecuting this action;
and
 - g. For such other relief as the court may deem just and proper.
2. With respect to the Second Cause of Action---Conversion, Plaintiff prays for the following relief:
- a. For a declaratory judgment finding Park City's intentional actions in altering the ditch and releasing environmental contaminants to the Property have resulted in conversion of the water rights and land by Park City;
 - b. For a permanent injunction enjoining Park City from further alterations of the Pace-Homer Ditch and appurtenant facilities and works;
 - c. For a permanent injunction enjoining Park City from releasing water from the Judge Tunnel and other water sources containing environmental contaminants to Silver Creek and its tributaries;
 - d. For an order of the court requiring Park City to clean up and restore the Property;
 - e. For an award of damages in an amount to be determined at trial;
 - f. For punitive damages in an amount to be determined at trial;
 - g. For all costs, including attorney's fees incurred in prosecuting this action;
and
 - h. For such other relief as the court may deem just and proper.

3. With respect to the Third Cause of Action---Interference (Quantity), Plaintiff prays for the following relief:

- a. For a declaratory judgment declaring and defining the water rights of the parties;
- b. For a permanent injunction enjoining Park City from interfering with the Water Rights of Plaintiff;
- c. For an award of damages in an amount to be determined at trial;
- d. For punitive damages in an amount to be determined at trial;
- e. For all costs, including attorney's fees incurred in prosecuting this action; and
- f. For such other relief as the court may deem just and proper.

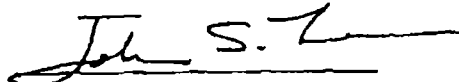
4. With respect to the Fourth Cause of Action---Interference (Quality), Plaintiff prays for the following relief:

- a. For a declaratory judgment declaring and defining the water rights of the parties;
- b. For a permanent injunction enjoining Park City from interfering with the Water Rights of Plaintiff;
- c. For an award of damages in an amount to be determined at trial;
- d. For punitive damages in an amount to be determined at trial;
- e. For all costs, including attorney's fees incurred in prosecuting this action; and

f. For such other relief as the court may deem just and proper

DATED this 8th day of October, 2010.

FLITTON & SWENSEN



John S. Flitton

Lara A. Swensen

Attorneys for plaintiff

Address of Plaintiff:

Nadine Gillmor
P.O. Box 130
Oakley, Utah 84055

Address of Defendants:

Park City Municipal Corporation
445 Marsac Ave.
Park City, Utah 84060-1480

Park City Water Department
1053 Iron Horse Drive
P.O. Box 1480
Park City, Utah 84060-1480

EXHIBIT A

Flitton & Swensen

ATTORNEYS AND COUNSELORS AT LAW

SUITE B-102 1840 SUN PEAK DRIVE
PARK CITY, UT 84098
PHONE 435 9400842 FAX 435 9400852

JOHN S. FLITTON
LARA A. SWENSEN

March 22, 2010

Sent via email (clint.mcafee@parkcity.org) & U.S. Mail

Clint McAfee, P.E.
Park City Municipal Corporation
1053 Iron Horse Drive
P.O. Box 1480
Park City, UT 84060-1480

Re: Construction at Pace Homer Ditch

Dear Mr. McAfee:

This firm represents Nadine Gillmor in matters relating to her ownership interest in water rights within the Snyderville Basin, including Awards 820 and 968 of the Weber River Decree. It has come to our attention through a letter sent by you to Mrs. Gillmor, that Park City intends to significantly alter the Pace Homer Ditch. Those alterations include plans to pipe significant sections of the periphery ditch located near U248 in Section 2, Township 2 South, Range 4 East, and removal of Mrs. Gillmor's flume and associated diversion works. Apparently, Park City has already commenced construction activities on the ditch. Understandably, Mrs. Gillmor is concerned that Park City has begun its disturbance work before any attempts have been made to contact her in person and secure permission to disturb the ditch or interfere with her water rights.

As an owner of the Pace Homer Ditch and appurtenant vested water rights, Mrs. Gillmor has a vital and legally protected interest in any activities that may impact the ditch, its diversion structures, or the carrying capacity of the ditch and source water that makes up any part of her water rights. The brief letter that you sent, which was dated March 10, 2010, and received Thursday, March 18, 2010, does not evidence the legal authority claimed by Park City that would allow it to undertake the disclosed construction activities affecting the ditch, Mrs. Gillmor's diversion structure, or her decreed water rights.

Without additional clarification, it appears that Park City lacks the legal authority to alter Mrs. Gillmor's ditch in the manner described by your letter and anticipated by the enclosed drawing titled "Pace Homer Ditch Improvements." Your letter correctly acknowledges that the Pace Homer Ditch historically has been used to deliver irrigation water under Water Right No. 35-8820. However, that recognition alone is insufficient to provide Park City with the unilateral authority to alter the ditch, remove the existing diversion structure or change the manner in which seepage water is supplied to Mrs. Gillmor under her interest in Awards 820 and 968 of the Weber River Decree. Before Park City

resumes any construction activities on the ditch, easement or diversion facilities, it has the burden of demonstrating its legal authority. Specifically, Park City must address its right to alter and pipe the ditch, its right to disturb or remove the Gillmor flume, how its proposed activities and alterations will nor impair the quantity or quality of water under Mrs. Gillmor's rights, and how it intends to protect Mrs. Gillmor's property from contamination caused by disturbance of contaminated soils within the construction area.

1. No Right to Alter the Pace Homer Ditch.

Based on a thorough review of the files contained within the records of the Utah Division of Water Rights, it is readily apparent that the portion of the ditch Park City plans to remove and replace with pipe never formed a part of the distribution system for the water rights owned by Stanley and Alma Pace and subsequently acquired by Park City. Instead, the lateral portion of the ditch you intend to remove is appurtenant to the property historically owned by Florence Gillmor.¹ Water is diverted into that periphery ditch as the exclusive means of conveyance for beneficial use on lands located in the northeast portion of Section 2, Township 2 South, Range 4 East. Those lands are not owned by Park City and were not irrigated under the portions of Award 820 and 968 acquired by the city. Moreover, the ditch on which Park City has begun its disturbance work does not, and never has, directly conveyed water to the Pace properties located several miles downstream. Importantly, the water conveyed through the periphery ditch contributes to the seepage flows that form a significant part of Mrs. Gillmor's water supply used to irrigate lands in Section 35, Township 1 South, Range 4 East. Those seepage rights are made more important by Park City's acknowledged interference with the flows of Dorrity Springs and resulting loss of direct flows in upper Silver Creek.

2. No Right to Disturb, Alter, Remove or Replace the Gillmor Flume.

In addition to its lack of demonstrated rights in the periphery ditch, Park City has no legal right, under any claim of authority, to alter, remove, or otherwise interfere with the Gillmor flume located at the head of the ditch. See Utah Code Ann. § 73-1-14. That flume, which diverts water under Mrs. Gillmor's rights and measures and apportions the flows to which she is entitled, was constructed and paid for by the Gillmors for the exclusive benefit of their property and water rights. Neither Park City, nor its predecessors-in-interest, made any contribution to the construction or maintenance of the flume (this is consistent with Park City's historical lack of involvement in the ditch.) However, the "Pace Homer Ditch Improvements" specify that Park City intends to remove the existing flume and set it aside for identification and removal by the owner. Those notes evidence a callous and cavalier disregard for the property rights of Mrs. Gillmor. The suggestion in the drawings that Mrs. Gilmore is responsible for identifying and reclaiming the structure reverses the legal responsibilities of the parties. Park City is not permitted to make the planned alterations or remove the flume. Any

¹ In addition, following acquisition of the Pace interest in Awards 820 and 968, Park City filed change applications to gain authorization to eventually move all of the water from the historical diversion and conveyance facilities to municipal water sources. During the more than 10 years since Park City acquired the bulk of the water rights, the city has not participated in maintenance of the ditches that serve the historical Pace lands or contributed towards the cost of that maintenance pursuant to Utah Code Ann. §73-1-9.

failure to comply with the prohibitions contained in Utah Code Ann. § 73-1-14 may subject the persons responsible for interference with Mrs. Gillmor's diversion and conveyance works to criminal and civil liability. See Utah Code Ann. § 73-2-27 (specifying the criminal penalties for interfering with waterworks).

3. Impairment of Mrs. Gillmor's Water Rights.

As noted above, Mrs. Gillmor has serious and valid concerns regarding interference with her water rights that would result from Park City's unilateral and unauthorized actions. Replacing the existing ditch with a closed pipeline will significantly reduce seepage flows that form a portion of the flows that contribute to Mrs. Gillmor's rights. Any reduction in the quantity of water available at Mrs. Gillmor's property will result in substantial damages and subject the city to potential liability. Park City's removal of the Gillmor flume will also impede Mrs. Gillmor's ability to use her water rights on downstream property by removing the present means of diverting and apportioning the waters of Silver Creek relied upon by Mrs. Gillmor. Admittedly, it is not clear from the information you have divulged whether there are plans to replace this flume with any reasonable alternative. However, as stated above, Park City does not have the right to disturb the flume in any manner, including any alteration in flows passing through the flume or replacement of the structure itself.

The importance of maintaining the historical Silver Creek flows for other water users, including Mrs. Gillmor, was recognized by the State Engineer's imposition of express conditions in the Memorandum Decision approving Park City's Silver Creek "global" Change Application a28638 (35-1660). That condition provides that "[t]he use of water for municipal purposes must not exceed the historic depletion of water under the individual rights. *An amount of water equal to the historic return flows must be returned to the Silver Creek drainage....*" (Order of the State Engineer, Permanent Change Application 35-1660 (a28638), June 8, 2007) (emphasis added). Accordingly, any decrease in Silver Creek flows, including direct and seepage flows, would constitute unlawful interference with Mrs. Gillmor's vested water rights.

4. Contamination of Water and Lands

In addition to the property and water rights issues implicated by Park City's planned alterations, Mrs. Gillmor is also concerned that Park City may not have considered how the proposed construction may have other, unanticipated detrimental impacts. Specifically, Park City's zone of activity for the project is located within an identified EPA superfund site. Based on detailed scientific studies made in connection with the EPA designation, the construction activities will disturb contaminated soils and release hazardous substances into the natural stream channel and subsurface waters. The hazardous substances entering the water supply will spread to Mrs. Gillmor's lands and render her property unfit for all intended purposes. Any such impacts attributable to Park City's actions will result in liability and expose the city to claims for inverse condemnation. In addition, the city will be liable for any damages to livestock and crops. In addition, any degradation in the quality of water, particularly given the nature of the pollutants contained in the disturbed soils, will result in actionable interference

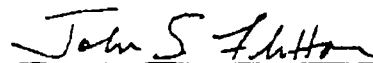
with Mrs. Gillmor's water rights. See, e.g. *Salt Lake City v. Boundary Springs Water Users Ass'n.*, 270 P.2d 453, 455 (Utah 1954)

5. No Contribution.

Finally, Park City shall not be entitled to any contribution from Mrs. Gillmor that might be claimed under Utah Code Ann. §73-1-9. There is no benefit to Mrs. Gillmor or the other owners of the ditch that will result from Park City's alterations. Conversely, Mrs. Gillmor will suffer significant and irreparable harm if Park City pursues it unauthorized and ill-advised alterations.

Because Park City has already commenced construction activities, timing is critical. We would like to meet with Park City to discuss our concerns in greater detail and provide the city with the opportunity to legally justify its actions. Obviously, such a meeting can only be productive if Park City first ceases and desists from any activities that may result in disturbances to the ditch, diversion structures, ditch easement and Mrs. Gillmor's water rights.² Recognizing the substantial and irreparable impacts that will result from those construction activities, we can only hold off pursuing other remedies until 12:00 pm, Tuesday, March 23, 2010. Accordingly, we require a response to this letter by that time. Hopefully, we can work through the issues of concern and arrive at a mutually beneficial solution. You may reach me at the numbers listed above.

Very truly yours,



John S. Flitton
Lara A. Swensen
Flitton & Swensen

cc: Tom Daley (tdaley@parkcity.org)

² It appears from the timing of the construction activities that Park City mistakenly assumes that its activities will not interfere with Mrs. Gillmor's water rights. That position ignores the year-round uses authorized under those rights. Any alteration of flows, including degradation of the quality of water comprising those flows, will result in direct and actionable interference. Moreover, the nature of alterations contemplated by Park City cannot be made during the planned construction period. Any such alterations can only be constructed between October 1 to March 1 under the restrictions contained in Utah Code Ann. § 73-1-7 (enlargement of the ditch, which is an express component of the alteration project as detailed in your March 10, 2010 letter).

Flitton & Swensen

ATTORNEYS AND COUNSELORS AT LAW

1640 SUN PEAK DRIVE
SUITE B-102 PARK CITY, UT 84000
TELEPHONE 435 9400842 FAX 435 9400652
JOHN S. FLITTON

March 23, 2010

Sent via email (tdaley@parkcity.org)

Thomas Daley
Deputy City Attorney
Park City Municipal Corporation
445 Marsac Ave
Park City, Utah 84060-1480

Re: Pace Homer Dispute


Dear Tom:

I received your emailed response to my letter this morning. After carefully reviewing the letter, it is clear that Park City and my client have very different views regarding the basis for the city's claim to authority in disrupting the ditch and removing the Gillmor flume. I had hoped that we could sit down together and resolve this matter without the necessity of judicial involvement. However, it is apparent that the city's position is already firmly settled. The two telephone messages that I left at your office today seeking to meet with you have not been returned. I spoke with your receptionist at about 5:00 pm and she stated that while you had been in the office during the afternoon, you had left for the day. As I stated in the letter and on your voicemail, timing is critical because the city has already removed the flume and the ongoing construction will further damage my client and irreparably impair her property and water rights as more particularly set forth in my March 22, 2010 letter.

At this point, I have made consistent efforts to meet with you and address the discrepancies between our respective positions. Clearly, Park City bears a burden of at least facially supporting its claim to authority. My client's decreed rights in the ditch, water rights and appurtenant facilities have not been questioned. Unfortunately, your response email does not provide any documentation of your claimed authority, despite the existence of numerous historical records relating to the ditch.

Following your failure to respond to my messages, as well as the expiration of the un heeded deadline for ceasing disturbance activities, my client has directed me to pursue judicial remedies in an effort to minimize her losses. I will keep you informed of any further immediate action we may take as my client pursues her claims. Notwithstanding our intent to pursue legal remedies, I am still willing to meet with you and discuss the city's claim to authority.

Very truly yours,


John S. Flitton

From: Tom Daley <tdaley@parkcity.org>
Subject: RE: Demand Letter
Date: March 23, 2010 6:09:55 PM MDT
To: John Flitton <johnflitton@me.com>
Cc: Clint McAfee <clint.mcafee@parkcity.org>, Kathy Lundborg <klundborg@parkcity.org>

John, late this afternoon I received the voicemail message you left at 12:49 p.m. today, Tuesday, March 23. I am home with my daughter today as we both have strep throat. In your message, you asked to meet to discuss differences of opinion regarding the ramifications of installing a pipe along a stretch of the Pace-Home Ditch.

As I said in my email to you this morning, please send me whatever questions you have regarding the pipe. The letter you sent at 12:55 a.m. Monday morning is so inaccurate and factually flawed that I do not see the need for a meeting unless you *raise a valid concern*. I will, of course, respond to whatever questions you send to me in writing.

I also learned late this afternoon that you contacted my staff and acted in a very unprofessional and uncivil manner. While your voicemail message to me was cordial, I understand you threatened my staff and ultimately hung up the phone when asked for contact information.

I also understand that you advised my staff that I had "one last chance to return your phone call" or you would file a lawsuit. Please consider this email a response to your phone call.

Please email me at your earliest convenience with any questions or concerns that you may have on behalf of your client Nadine Gillmor regarding the installation of the pipe in the Pace-Homer Ditch. I will, once again, respond to each concern you raise in a timely manner.

Thanks, Tom

From: John Flitton [mailto:johnflitton@me.com]
Sent: Monday, March 22, 2010 12:55 AM
To: Clint McAfee
Cc: Tom Daley
Subject: Demand Letter

From: John Flitton <johnflitton@me.com>
Subject: **Your recent email**
Date: March 23, 2010 6:39:55 PM MDT
To: tdaley@parkcity.org
1 Attachment, 26.8 KB



Tom:

I just emailed you following my inability to contact you this afternoon. Apparently, you also sent an email and it appears that our messages have crossed paths. Obviously, our timing is off today.

As I stated at the close of my letter, I am willing to sit down and have a meaningful discussion regarding the ownership and control issues on the ditch. I am disappointed that you continue to refuse to provide any documentation of your claimed authority or to specific cite any legal justification for the city's unilateral actions that negatively impact my client. My letter provides a detailed roadmap of my client's position and, based on your response to the letter, there is no dispute that she owns water rights tied to the ditch and covered by the Stipulated Judgment in the Dorrity Springs case.

The city's unwillingness to suspend construction activities to allow for such discussions is also disappointing. Under any scenario, my clients water rights are impacted by those activities and her ability to receive the water to which she is entitled is compromised. I wish to remind you that in addition to the irrigation rights that begin April 1 of each year, my client also has year round rights in the ditch. The city has made no effort to address the interference with those rights and the April 28th construction target is already well within the irrigation season.

I am not sure if you have physically walked the ditch that Park City is altering, but that ditch does not connect to the Pace property or form a part of the city's water rights. I suggest that if you would like to meet, we schedule a site meeting for tomorrow afternoon and walk the ditch as well as discuss the ownership issues, including my client's written documentation of payment for the flume. If you would like to meet, please let me know so that I can contact my client this evening. I will also contact the former Regional Engineer, Jim Riley, and ask him to attend because of his substantial knowledge of the ditch and associated water rights.

Finally, with respect to the phone call this afternoon, I did not threaten anyone. When your receptionist said you were out, I simply asked if you had been in to determine whether or not you had received my earlier voice message. When I was told that you had in fact been in the office I asked her if she could contact you so that I have fulfilled my responsibility of attempting to set up the requested meeting. Apparently my sense of urgency and description of the nature of the matter conveyed the wrong message. I apologize for any misunderstanding. So that the record is clear, there is no threat either direct or implied by my correspondence or messages. I remain hopeful that we can resolve this dispute in a civilized manner.

Please let me know whether or not you would be willing to meet tomorrow afternoon. I have a meeting with the State Engineer on another matter at 11:00 and should be back in Park City by at least 2:00 pm.

Thanks for your responses and attention to this matter.

John

From: Tom Daley <tdaley@parkcity.org>
Subject: **RE: See attached**
Date: March 24, 2010 9:56:13 AM MDT
To: John Flitton <johnflitton@me.com>
Cc: Kathy Lundborg <klundborg@parkcity.org>, Clint McAfee <c.int.mcafee@parkcity.org>, Kyle Macarthur <k.macarthur@parkcity.org>, Rich Hilbert <rich@parkcity.org>

John, I have read your letter dated March 23, 2010 which you emailed to me at 6:18 p.m. on March 23, 2010, and the email you sent to me at 6:40 p.m. also on March 23, 2010.

I am not able to walk the ditch with you today. I am still ill and home with my daughter who is very ill with strep throat. I was not, as your March 23 letter asserts, in my office yesterday.

I do not think we need to walk the ditch in order to have a meaningful discussion of the few substantive points you have raised. Without more information, I am not in a position to respond to your allegations that: 1) the flume that was removed belongs to Nadine Gillmor; 2) the flume was used to divert water to Nadine Gillmor's property; and 3) Nadine Gillmor's water rights will be impaired by increasing the flow of water to her property. Standing next to the ditch is not going to help me or anybody else at Park City comprehend what it is you are claiming.

The work that is being done now is no different than previous projects to pipeline much larger sections of the ditch immediately upstream from the current work site. Did your client experience adverse impacts on her water rights as a result of those pipelines?

As you are aware, the 1984 decree states that the Pace Homer Flume had already been installed by Park Meadows and Park City at their own expense. That flume was relocated as part of the UDOT reconstruction of Highway 248. Did Nadine Gillmor pay for the relocation of the flume as part of that project? Please send the documentation referenced in your email of 6:18 p.m. March 23, 2010.

Your letter also incorrectly asserts that Nadine Gillmor's rights in the ditch have not been questioned. There have been a number of questions raised about the status of Nadine Gillmor's water rights. Where has the water under her portion of Water Right Number 35-8820 been used? What beneficial uses have occurred? Where are her diversion works? What is the use to which she is presently entitled and is water being so used? Was her portion of the water right conveyed with what is now the Park City Heights property?

Finally, your assertion that the ditch that is being worked on is not the Pace-Homer Ditch that historically conveyed water to the Pace property is bewildering. Please provide your alternative explanation of how the water was conveyed.

Without answering the questions in this email, any action taken by you on behalf of Nadine Gillmor to interrupt Park City's water importation project will be viewed as actions taken in bad faith. In light of your statement in your March 23, 2010, letter that you have made "consistent efforts to meet" with me, I guess I have to remind you that we first received word from you on Monday morning and it is now Wednesday morning and, unfortunately, I picked these two days to enjoy a bout of strep throat.

I am always willing to meet to resolve disputes, John, but there is no genuine dispute of which Park City is aware. If there is any substance to your many claims, please provide it and we can then discuss the differences of opinion. Please provide the information requested in this email and please provide any information that is inconsistent with the points enumerated in the email I sent to you at 10:16 a.m. on March 23, 2010. If you provide something that gives rise to a dispute, Park City will respond immediately and with great deference to your client.

Thanks, Tom

From: John Flitton [mailto:johnflitton@me.com]

Sent: Tuesday, March 23, 2010 6:18 PM

To: Tom Daley

Subject: See attached

Flitton & Swensen

ATTORNEYS AND COUNSELORS AT LAW

1840 SUN PEAK DRIVE
SUITE B-102 PARK CITY, UT 84098
TELEPHONE 435 8400842 FACSIMILE 435 8400852
JOHN B. FLITTON

March 31, 2010

Sent via email (tdaley@parkcity.org)

Mr. Thomas Daley
Deputy City Attorney
Park City Municipal Corporation
445 Marsac Ave.
Park City, Utah 84060-1480

Re: Pace Homer Dispute

Dear Tom:

I am not sure why there appears to be so much difficulty in establishing clear communication and giving thoughtful consideration to the ramifications of Park City's decision to pipe a significant portion of the Pace Homer ditch. A careful review of our correspondence reveals significantly different viewpoints with no clear justification by Park City for its claimed right to alter the ditch absent agreement by the ditch owners. In fact, your responses seem to indicate that Park City is not particularly concerned with understanding the clearly established rights of my client or taking any steps to remedy the situation. Each time that I have proposed a face-to-face meeting in order to discuss the issues in dispute and satisfy the questions to which Park City should already have had answers before commencing the project, you have indicated that such a meeting would be fruitless and in fact stated that you would be happy to meet with us "should [we] raise a question that has merit or at least factually sound." My client's interests are important and the correspondence that we have provided has specifically referenced the water rights associated with her ownership of the ditch and impacted by Park City's activities.¹

In your March 24, 2010 email (sent at 9:56 a.m.), you reference previous alterations to the ditch that coincided with the Dorrity Springs litigation as justification for Park City's most recent activities. Clearly, those prior alterations are for and part of the claims raised by Mrs. Gillmor and the other plaintiffs against Park City and incorporated into the settlement agreements and 1984 Decree. Contrary to the implications in your letter, that Decree settled only those issues that preceded the settlement and did not give Park City ongoing rights in the ditch or the ability to make unilateral modifications in the

¹ Despite specifically referencing Nadine Gillmor's ownership of portions of Awards 820 and 968 of the Weber River Decree in my March 22, 2010 letter and your familiarity with the records of the Division of Water Rights, I am also enclosing a printout of the segregated water right that is owned by Mrs. Gillmor so that there will be no confusion concerning the water right issue. That right is associated with Mrs. Gillmor's properties located in Section 35, Township 1 South, Range 4 East and, in addition to being called out in the decree, the ownership interest is shown on the hydrographic survey maps as being attached to Charles Gillmor.

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future. Moreover, any assumption that Park City's responsibility for installing the flume constitutes a basis for ownership rights in the ditch is completely unfounded. Under the 1984 Decree, Park City assumed a strict responsibility to deliver a measurable quantity of water to the Pace Homer ditch at the location of the flume. That defined quantity of water was intended by the parties to offset the interference with Dorrity Spring flows caused by development of the Park Meadows well. The obligation to measure flows and deliver water at a flume established as the delivery point does not translate into a right to alter not only the physical facilities agreed upon, but also the respective obligations and rights of the parties as memorialized in the Decree. Accordingly, your reference to the Decree does not in anyway establish Park City's right to alter the ditch or justify your unwillingness to consider the concerns expressly raised by my client in our correspondence.

In your March 24, 2010 response, you also state that my "assertion that the ditch that is being worked on is not the Pace Homer ditch that historically conveyed water to the Pace property is bewildering." The confusion evidenced by your response is the very reason that I suggested a site visit so that there would be no dispute regarding the factual layout of the ditch or the historical irrigation practices employed by the Gillmors and Paces under jointly owned Awards 820 and 968.

Subsequent to my last letter, I have visually confirmed the facts alleged in my original letter. Immediately east of the project area, which ends at the Richardson's Flat road, is the property historically owned and irrigated by Florence Gillmor. The ditch that Park City has disturbed physically conveys water to Florence Gillmor's lands and does not extend beyond her historical property borders. Instead, water measured at the flume and conveyed to the historical Pace property, is released to Silver Creek and is diverted further downstream at the G.M. Pace ditch and thereafter conveyed to the historical places of use. The G.M. Pace ditch is the ditch historically controlled by the Pace family and is specifically called out in the Decree, as well as being shown on the State Engineer hydrographic survey maps. In fact, a thorough review of those historical maps, combined with a visual inspection, demonstrates that there has been very little change in the decreed ditches since 1937.

Instead of countering my assertion that the Gillmor flume is in fact the new diversion point under the water rights as defined in the 1984 Decree, your statements seem to confirm Park City's lack of rights in that particular ditch through the piped section. As it appears that you have made a review of Park City's own records relating to the 1984 litigation and settlement, I assume you are aware that one of the issues involved in those discussions was the securing of a flood easement over property owned by D.A. Osguthorpe necessary to convey water from the point of delivery back to Silver Creek. That flood easement was secured to facilitate water flows under Park City's delivery obligation for use on the Gillmor Section 35 property and the Pace property downstream. Because of the joint ownership of the historical awards, water was divided among the different landowners pursuant to turns on the ditch. Specifically, each landowner had a defined period of time (which in this case was a number of days of the week), in which water was turned into the individual ditches of each party. On the days that Florence Gillmor had her turn on the ditch, water was allowed to pass through the flume into the ditch now subject to this dispute and to her lands bounded by U.S. 40 in Section 2, Township 2 South, Range 4 East. On the days in which Nadine Gillmor and the Paces had their turn on the ditch, boards were placed in the flume and the water delivered by Park City was allowed to flood over the Osguthorpe property and into the Silver Creek channel for rediversion at the Gillmor property in Section 35 and

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through the G.M. Pace ditch for the Pace properties located in Sections 15, 22, 23, and 26, of Township 1 South, Range 4 East. Accordingly, the Pace water rights had an interest in the flume, which served as a diversion point on the ditch but no interest in the ditch beyond that flume, which is historically appurtenant to Florence Gillmor's awards and her property. That history is evidenced by the physical layout of each ditch and property, as well as correspondence and agreements that are contained within Park City's own records. Unfortunately, I was unable to inspect the historical flume or document its construction and use consistent with those evidentiary documents because Park City had already removed it at the time that I made my inspection.²

My review of our correspondence also reveals that the environmental issues raised in my March 22, 2010 letter have received very little focus. In fact, the only reference in your responses to those concerns is your contention that the construction activities do not impact areas that have been identified by the United State Environmental Protection Agency as containing hazardous substances. As you correctly point out in your initial March 23rd response letter, the Superfund site officially designated by the EPA is located immediately east of the Florence Gillmor property in Section 1, Township 2 South, Range 4 East, and not on the lands impacted by Park City's activities in Section 2. However, as reflected in the EPA records housed at the Park City Public Library, the entire Richardson's Flat area has significant contamination issues that are not confined exclusively to the Section 1 Superfund site. In fact, identified areas of contamination within the Snyderville Basin closely correspond to the historical railroad right-of-way over which mining companies hauled ore and other materials responsible for environmental contamination. As you are well aware, Park City was forced to confront contamination issues with the pipeline it recently constructed to convey water from Promontory to Quinn's Junction. Lands impacted by Park City's construction activities for that project are located well outside of the Superfund site but are nevertheless subject to EPA concern and oversight. A review of the aerial photographs and the site on which Park City is altering the ditch reveal that the railroad right-of-way passes through that property immediately south of the ditch alignment. The construction activities are taking place in a location immediately adjacent to Silver Creek. Aerial photographs also show what appears to be a tailings pile that may include tailings from the same mines responsible for EPA's Superfund designation of the property immediately east of the project area.

The EPA reports housed at the Park City Library contain statements expressing concern regarding disturbances in Section 2 and other areas affected by the hauling and processing of ore materials. Some of those reports raise significant health concerns and reference the threat to water quality and agricultural production. I was already familiar with those documents and many of those concerns at the time that I drafted my March 22, 2010 letter. My client has also experienced issues relating to contamination in the past on her Section 35 property. The construction plans provided by Park City heightened those concerns because of the significant disturbance associated with removing the ditch and installing a replacement pipeline as well as issues relating to the increased concentration of water flow over an area that historically was the subject of substantial mining and refining activity. Accordingly, the significant environmental and public health issues raised in my letter merit at least

² So that there is no misunderstanding or attempts by Park City to create an issue relating to my inspection, I did not enter onto lands owned by Park City or any other person along the ditches. My inspection was made from the public right-of-way and later confirmed by a review of aerial photographs spanning the period from 1993 to 2010.

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some discussion that may also include opinions by Park City's consultants and perhaps review by the Environmental Protection Agency. Obviously, the potential liability to Park City warrants a more detailed discussion and response.

Although not specifically addressed in my initial correspondence, the justifications made by Park City in its March 10, 2010 letter for constructing the pipeline appear to not be based on the relevant facts regarding the ditch in question. Based on my site inspection and thorough review of aerial photographs, the beaver ponds referenced in Park City's letter are not located within the construction zone. Furthermore, my review also indicates that the historical ditch channel is well defined and not likely to cause any flooding of the Park City water treatment plant property. In fact, the quantity of water flowing through that ditch has been significantly reduced due to Park City's transfer of the water rights appurtenant to the Pace property to municipal sources that do not rely on the ditch as a point of diversion or delivery. As evidenced in Park City's efforts to justify the construction, alterations to a ditch must be based to prevent damage to the property. My client is not aware of any instances in which the ditch has overflowed or somehow flooded the Park City property. Moreover, Park City has never raised flooding from the ditch as a concern in any written correspondence directed to my client or other neighboring property owners. As set forth above, the quantity of water flowing through that ditch represents only a minor fraction of the water historically conveyed when full use of the Pace water rights was made on the properties located in lower Silver Creek. This is also an issue that demands further clarification and discussion.

One of the difficulties I have encountered in trying to address points made in your letters, is that your responses appear to be a continuously shifting target. I was apparently wrong in assuming that we share the same familiarity with the historical water rights or access to the public information that forms the factual basis of the dispute. Your responsibilities in assessing this project are much broader and more encompassing than the narrow set of issues affecting my client. Over the years, I have come to realize that discussions relating to water tend to include a vernacular that is unique. Reviewing my letters, I recognize that some of my statements include short-handed references to water right issues that may lead to confusion. Accordingly, I take blame for much of the miscommunication that appears to have taken place through this correspondence. Hopefully the details that I provided in this letter can eliminate much of that confusion and allow Park City to better understand my client's position and her concerns.

Despite a somewhat rough start, I still think it is important that we meet and address the various issues that have been raised in our correspondence. Such a meeting is important to ensure that there are no future misunderstandings or confusion and that my client and Park City at least understand their relative positions to one another. To that end, I have secured the consent of my client to make another effort to schedule a meeting and discuss these issues face-to-face. I am hopeful that Park City will find the time to allow my client the opportunity to be certain that her concerns are fully understood so that we may avoid any unnecessary dispute that may result from a failure to communicate. In your correspondence you expressed a willingness to respond to specific questions and in fact, suggested that my client raise those questions as a pre-requisite to scheduling a meeting. Specifically, your March 23rd letter states:

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Please email me at your earliest convenience with any questions or concerns that you may have on behalf of your client, Nadine Gillmor, regarding the installation of the pipe in the Pace Homer ditch. I will, once again, respond to each concern you raise in a timely manner.

Accordingly, to meet that request I am providing a brief list of questions that I think will be helpful in getting to the heart of this dispute and will hopefully facilitate a meeting and more precise discussion:

1. Please provide an explanation of the basis for Park City's claimed rights in the Pace Homer ditch from the Gillmor flume located immediately south of State Road 248 and continuing to the intersection of the ditch with the Richardson Flat road (this is the area identified on the Bowen Collins construction plans provided to Mrs. Gillmor in Park City's March 10, 2010 letter).
2. Please provide the legal basis for Park City's rights to unilaterally pipe the subject portion of the Pace Homer ditch without first obtaining consent of the owners of water rights appurtenant to that ditch.
3. Please explain how water delivered under the 1984 Decree to Mrs. Gillmor will be conveyed, after construction is complete, to her historical points of diversion (that remain the same as those described in the Weber River Decree).
 - a. Will water be allowed to flow across the flood easement to Silver Creek so that Mrs. Gillmor can continue to receive her historical water supply?
 - b. How will Park City measure the water delivered under the 1984 Decree now that the flume has been removed?
 - c. How will the water measurements be conveyed to Mrs. Gillmor and how can she be assured that Park City is meeting its delivery obligations now that her visual verification no longer exists?
4. If water will not flow across the historical flood easement, does Park City plan to compensate Mrs. Gillmor for the effected extinguishment of the right that she acquired from D.A. Osguthorpe?
5. What uses does Park City intend to make of the pipeline given the fact that the Pace portion of Awards 820 and 968 are covered under the change application that moves the historical points of diversion to Park City culinary water sources?
6. Does Park City intend to convey the waters under those Awards through the pipeline notwithstanding the change application? The construction drawings supplied to Mrs. Gillmor suggest the real purpose for piping the ditch is to convey water either to or from

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the water treatment plant (Park City\General Services\Quinns WTP Finished Water Pipeline)

- a. If Park City does intend, at some point, to abandon its uses on the historical Pace property, how will it ensure that water delivery to Mrs. Gillmor will be sufficient to allow her to irrigate the full acreage covered under the Weber River Decree and represented by her water rights? (It appears that whatever Park City intends may have an impact on the terms of the 1984 Decree and should be addressed).
7. What measures are Park City or the contractors taking to prevent contamination of Mrs. Gillmor's downstream property that may result from disturbances during construction or concentration of flows through the pipeline going forward? (Coincidentally, I received Park City's Memorandum in Opposition to the United States Government's Motion to Dismiss the federal lawsuit today. I was interested to note that Mr. Bakaly's signed Declaration states that "in evaluating alternative, perpetual water sources for Park City, one of the most important facts I consider is whether a project will be environmentally sound..." I assume that same policy is applicable here.)

Obviously my list of questions is not exhaustive and there will undoubtedly be additional issues that need to be explored but I am hopeful this will at least provide a good starting point to meet and attempt to agreeable resolve the concerns of both my client and Park City.

Please contact me after you have reviewed the letter so that we can set up a time to meet. As always, I appreciate your attention to this matter and look forward to hearing from you.

Very truly yours,



John S. Flitton